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# CALIFORNIA LITIGATION:

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## Three Cheers or Two Tiers?
## Predicting the Future of Our Courts

By Gerald E. Uelman

**I** vividly remember the first time I saw *2001: A Space Odyssey,* in 1968. The "new millennium" seemed so far away it was easy to believe we'd all be zipping around from one space-station to another when it arrived. Now that the new millennium is officially here, one year ahead of schedule, I must confess my disappointment. We're still riding buses, we're still stuck in traffic jams and while my students have greater access to information they just don't seem to be any smarter than those I taught thirty years ago. Yet *2001* is still a marvelous metaphor for our struggle to control technology. The astronaut's frantic effort to turn off the computer is replicated thousands of times a day as we struggle with our addiction to instant gratification of every curiosity. I'm still amazed at how many Americans have not discovered that the little red button on their remote empowers them to turn off their television sets whenever they choose.

While I'm not a full-fledged Luddite, I am skeptical of those who predict a rosy future for our courts. Six years ago, then Chief Justice Malcolm Lucas convened a blue-ribbon study of our court system to set the agenda for "2020." The Commission on the Future of the Courts envisioned a future populated with really smart judges and really cooperative lawyers, a world in which the legislature had apparently been suspended and the initiative process abolished. Hope overcame experience. In short, 2020 was portrayed as a mythical utopia in which litigation was declining because the law had been "settled" and litigants had less to fight about.

My vision of where we're headed is more pessimistic. Progress gives us more to fight over, not less. And does anyone actually believe that human greed is decreasing? I believe that the competition among lawyers will intensify, the bar will divide into two hemispheres with an ocean between, the quality of our judges will decline and the level of public satisfaction with the public justice system will keep sinking. Those who can afford it will still travel first class with a private system of justice eager to serve them. Those who can't will be left behind. The only question is how far behind.

### — The Public School Analogy —

There's a depressing analogy for the likely future of the California court system. It's the California public school system. In the course of the past thirty years, we've watched California's public school system sink in a morass of neglect, confusion and incompetence. It went from one of the best in the country to one of the worst. Low test scores, teacher shortages, lack of books and computers and overcrowded, shabby classrooms confirm the decline.

What happened? While there's plenty of blame to go around, the bottom line is simply that our priorities got rearranged. The competition for our tax dollars became too intense and the schools were elbowed out. When the public pie is carved, the number of elbows is determinative. The size of any system's slice will depend upon the political clout of the "stakeholders," those who perceive they have something to gain or lose from the size of the slice. Twenty-five years ago, those who had a "stake" in California's public schools included a substantial majority of the electorate. Ninety percent of parents were sending their kids to public schools and employers saw the public schools as the source for their future workforce.

Today, one out of four children are attending private schools, being schooled at home, or being bussed to alternative "charter" schools. This "brain drain" feeds a downward spiral because the parents who "opt out"

are frequently the parents who are most involved in their children's education. Studies consistently confirm that the best performers as students are those whose parents are involved. The public schools are then left with the dregs — a disproportionate supply of students who don't want to learn, who have serious learning disabilities or whose parents can't or won't get involved. Disheartened teachers often leave for lower-paying jobs in the private sector where at least they can teach responsive, motivated students.

It's not likely that the huge recent infusion of cash to reduce class sizes in California's public schools will fix the problem. Reducing class size means supplying a lot more teachers and a lot more classrooms. Our best and brightest college graduates are not flocking to meet this new demand and taxpayer support for classroom construction is lagging. If the initial investment doesn't produce dramatic results, the political clout needed to sustain this effort will dissipate. The underlying problem is simply that not enough Californians feel they have a stake in the system anymore. The fastest growing sector of the electorate — those who vote — are our senior citizens. Their kids are through school and now they are more concerned with health care issues and public safety. The immigrant minorities who fuel the largest influx into our public school system exercise little political clout.

Ironically, at a moment in our history when new technology and the "information age" define our future the gap between those who can afford private education and those whose only choice is public education may measure the chasm between the "haves" and the "have nots." The chasm is growing deeper and wider every day.

**— A Two-Tiered Justice System —**

In all likelihood, the California court system will reflect this dichotomy. Two "systems" of justice will co-exist: a private system, where the judges are well-paid achievers, the conference rooms are clean and comfortable, the technology works, and justice is dispensed with speed and efficiency; and a public system, where underpaid bureaucrats serve as judges, the security guards outnumber the judges and long lines of litigants wait in run-down courthouses with peeling paint on the walls.

To put it bluntly, many "stake-holders" are leaving the public justice system. Who can blame them? Private dispute resolution offers many advantages. You can pick your judge. You're not stuck with a tyrant whose greatest concern seems to be getting through the crowded calendar by noon and shuffling off the "problems" to someone else. You can resolve your case in complete privacy excluding curiosity seekers and inquisitive news reporters. You can set hearings for times that accommodate everyone's schedule in pleasant, modern surroundings. It might even be cheaper. At the rate you're paying your lawyers any savings in time actually reduces your litigation costs.

As those who can afford it opt into the private justice system, the public system is left with a disproportionate share of the dregs just as the public school system is. The lawyers and litigants who want to crush each other and like to play "hard ball"; the growing legions of *pro per* litigants, who can't afford to hire a lawyer at all; and, of course, those accused of crimes, who have no choice. Judges who began their careers full of zeal are burning out at an alarming rate. There's little relief from the steady flow of the most demanding cases, the most obnoxious litigants and the least prepared lawyers. Many are retiring at the earliest opportunity. It's not primarily greed that drives them away, although many will earn three times what they earned as public judges. The real attraction is the opportunity to control their own workflow spigot and to regain their equilibrium. The boosters of private judging say, "you should be grateful to us. We're relieving the pressure on the system by removing the more complex disputes." True, but they are also removing the incentive for their well-heeled clients to support the public justice system and they are enticing the best judges to leave for greener pastures.

Ironically, our public justice system is finding it difficult not only to retain experienced judges but to maintain the flow of jurors so essential to preserving the right to jury trial. In some areas fewer than one-tenth of those summoned as jurors even bother to return the questionnaire.

A little more money could go a long way towards solving some of these problems. Raise the salaries and improve the retirement benefits for judges. Fund a system of judicial sabbaticals to alleviate burnout. Increase the *per diem* paid to jurors and provide comfortable waiting rooms. Chief Justice Ron George has

all of these on his list but he's discovering they don't rank very high on the priority list of the Governor or the legislature. Is it because the "stakeholders" in the system of public justice no longer wield much political clout? When he gets in line for the judicial slice of the pie can you guess who's moved ahead in front of him? The public schools!

**—Lawyers as Stakeholders —**

One might expect that California lawyer could do a lot to turn this situation around. If any group are major "stakeholders" in our system of public justice, it's the lawyers. And when it comes to political clout lawyers traditionally have some of the biggest elbows around. That's all changed, too. Lots of lawyers have political clout, but they don't flex their muscles for the public justice system. Their political agendas have become much more parochial. The plaintiffs bar expends its energy and resources battling initiatives proposed by the insurance bar. The corporate bar is more concerned with the private justice system than the public one. When they go to court they prefer to be in federal court. They're already paying for their judges; why pay twice? They may even learn a few new tricks from the battle over public school funding and start demanding vouchers to pay private judges.

The State Bar has been defanged. There are even those who insist that State Bar lobbying for more judges or higher judicial salaries or increased juror *per diem* is an unlawful expenditure of State Bar funds for political purposes. The sad reality is that the bar is also divided by the same chasm that divides the rest of our society. The lawyers who serve clients who can afford the private system of justice are not the same lawyers who answer the calendar calls in our public courts. As Chicago Lawyers demonstrated there are really two bars and they don't have much to do with each other. The bar that serves corporate clients is getting richer and the bar that competes for individual clients is getting poorer. The competition has become more intense and a substantial part of their income may depend upon court-appointed cases and court-appointed rates. The agenda for increasing those rates has fallen victim to the same lack of clout as the rest of the public justice system's agenda.

Among the greatest ironies of the last century is that we quintupled the supply of lawyers yet left the legal needs of the poor largely unmet. Funding for legal services programs and indigent defense services is declining while the need is increasing. This adds to the burdens imposed on the courts. When the poor and disfranchised come seeking justice without the aid of a lawyer judges and court personnel must assume new roles as teachers and facilitators.

**— Lawyers as Bureaucrats —**

The past century has also witnessed a radical transformation of the judicial office and those who are filling judicial vacancies. Judges used to assume the bench after a successful career in private practice and many brought with them a broad base of experience as litigators. With increased specialization and bifurcation of the bar those with substantial civil litigation experience became a rarer commodity as judicial candidates. The politicization of criminal justice issues turned the District Attorneys' offices into the chief source of judicial candidates. Those who came from the private bar more often came from the bar that serves individual clients not the big firms serving corporate clients.

One reason corporate clients prefer the private justice system is that they are more likely to find a judge who really understands their problems. The public justice system may have a handful of judges who came from the hemisphere of the bar that serves corporate clients but it just doesn't seem to do a very good job of matching judges with their real talents.

That problem is going to worsen in the wake of trial court unification. We used to be able to entice an occasional big firm litigator onto the bench by offering appointment directly to the Superior Court. They still took a big pay cut but at least they could avoid five years of trying small claims or shuffling through a crowded calendar of preliminary hearings or traffic cases. With consolidation, assignments will be made by seniority. If you're starting a judicial career late after years as a high powered litigator, a judicial appointment may simply be a ticket to terminal boredom.

Compounding the problem is the sinking level of judicial salaries. Today, even Deputy District Attorneys are

taking a pay cut when they accept judicial appointments. While the admirable goal of serving the public still motivates most judicial aspirants, they soon learn that the public is not a very appreciative employer. They've become part of a grinding bureaucracy in which the best strategy for survival is to keep your head down. The judges who make waves are most likely to be targeted for an election challenge.

**— Searching for Solutions —**

The forces that are pushing our court system into a "two tier" model are forces largely beyond our control. Every aspect of our lives in the twenty-first century will be lived on two tiers: health care, housing, transportation, education. The rich will get richer and live very comfortable lives. Those who are not will strive to become rich, but most won't make it and will lead lives of quiet desperation. Why should we anticipate that our court system will be able to straddle the chasm?

Returning to our public school analogy, however, we might find some strategies worth emulating. Those who are committed to the excellence of public education, and there are still many, have realized that public schools must still compete for students and the best way to compete is to offer choices. It can no longer be a "one size fits all" enterprise. High achievers should be identified and given the challenges that will keep them engaged. Those with learning disabilities must also be identified and provided an environment in which they, too, can thrive. That still takes more resources so the creative alternatives have to be aggressively marketed and sold to the public. Visibility of what the public schools are doing and explanations of why they're doing it have become the key to increasing public support.

Voter education and mobilization are also key elements to turning around the fate of public schools. Being a "stakeholder" needs to be transformed into a communitarian concept. We all have a stake in our public schools, whether our kids attend them or not, because they shape the quality of our community life. The schools need to become visible community centers not isolated bastions.

Can our public courts learn something from the example of our public schools? The future will arrive, whether we make the effort or not. But our efforts may have a lot to do with the kind of future we face. The breadth of the gap between our two tiers will measure our failure.

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The journal is sent free to members of the Litigation Section.

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